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So Lian Yee (trading in the name and style of Goldwell Trading) v China Railway Engineering Corp (M) Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCVC)(W)-2408–11 OF 2017
VERNON ONG, ABDUL RAHMAN SEBLI AND STEPHEN CHUNG JJCA
C 4 JANUARY 2019

Contract Law — Damages — Liquidated ascertained damages — Appellant appointed as subcontractor to construct earthworks, soil improvement, drainage and pipe culverts — Appellant claimed for work done and retention sum D *— Respondent counterclaimed for costs of rectification and liquidated ascertained damages — Whether actual damages or reasonable compensation must be proven — Whether first respondent failed to prove liquidated ascertained damages under s 75 of the Contracts Act 1950 — Whether learned trial judge erred in relying to clause in contract to award liquidated ascertained damages — Contracts Act 1950* E *s 75*

Evidence — Burden of proof — Person who alleged fact to prove it — Appellant appointed as subcontractor to construct earthworks, soil improvement, drainage F *and pipe culverts — Appellant claimed for work done and retention sum — Respondent counterclaimed for costs of rectification and liquidated ascertained damages — Whether appellant had completed his works — Whether appellant had proven his case — Whether learned trial judge erred in dismissing appellant's claim — Evidence Act 1950 s 101*

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This was an appeal from the order of the High Court which had dismissed the appellant's claim against the first respondent and allowed the first respondent's counterclaim against the appellant. The appellant was claiming for work done amounting to RM571,506.22 and the retention sum amounting to H RM318,871.16 under a subcontract with interest of 5%pa. Whilst the first respondent counterclaimed for the costs of rectification works amounting to RM540,828.52 and the liquidated ascertained damages ('LAD') amounting to RM2,535,000 based on cl 15.0 of the subcontract with interest on both sums at 5%pa. The appellant contended that the subcontract works were completed I in January 2008 and on 28 August 2009 the appellant had submitted the final claim, after submitting four final claims previously. The final claim dated 28 April 2009 was predicated on a letter dated 11 June 2009 from the first respondent which contained a final calculation certifying and admitting that final payment in the sum of RM571,506.22, which was argued by the

appellant to be certification and admission on the part of the first respondent that the sum of RM571,506.22 was due and payable plus the retention sum. The first respondent denied that the letter dated 11 June 2009 admitted any liability but merely confirmed the remaining sum was unpaid, however this unpaid sum was not due to the appellant because the work was not completed nor rectified. Due to the non-completion, the first respondent had to appoint third party contractors to rectify the works which the costs were to be set off with the outstanding payments due to the appellant, and that subsequently founded the basis of the counterclaim, where the first respondent claimed the sum of RM540,828.52 after setting off the costs and expenses incurred to rectify the works not done by the appellant and liquidated ascertained damages amounting to RM2,350,000 calculated based on cl 15.0 of the subcontract agreement. The contentions of the parties centered on whether each party had proved their respective case against the other.

Held, allowing the appeal in part, setting aside the award of RM2,535,000 for LAD; and affirming the counterclaim:

(1) The burden was on the appellant to prove his case. Based on the payment certificate No 10, certified on 19 March 2008, the current progress was 93.98% only. This contradicted his claim that the works had been completed. In addition, the appellant admitted that after January 2008, he had received letters from the first respondent complaining of defective and non-completion works. There were many such letters of complaint up to end of December 2008. These again contradicted his claim that he had completed the works in January 2008 (see paras 28–30).

(2) The learned trial judge found that by January 2008, the appellant had yet to complete its subcontract works. The learned judge also found that the appellant had opted not to call any evidence to show that he had completed the works and that the evidence was insufficient to contradict the evidence adduced by the first respondent. At the end of the trial, the learned judge dismissed the appellant's claims. These were based on the findings of facts by the learned judge who had the audio and visual advantage of watching and listening the witness during the trial. An appellate court would be slow to disturb the findings of facts of the learned judge unless he was plainly wrong. Therefore, the court held that the learned judge had not erred in dismissing the appellant's claims against the respondents (see paras 34 & 36).

(3) The learned judge ruled that the appellant did not put up a serious challenge on the evidence that was adduced to support the counterclaim and that the court ought to accept the evidence of the first respondent and allowed the counterclaim in full as pleaded. The present court agreed that the learned trial judge did not err in allowing the first respondent's claim for the sum of RM540,828.52. However, the court disagreed with

His Lordship's decision in allowing the first respondent's claim for LAD of RM2,535,000 (see paras 39–40).

(4) The apex court had dealt with the words 'whether or not actual damage or loss is proved to have been caused thereby' in s 75 of the Contracts Act 1950 ('the Act') where it was held that despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation. The first respondent claimed the sum of RM2,535,000 as LAD based on cl 15.0 of the subcontract agreement. The first respondent failed to prove the LAD under s 75 of the Act. The learned judge in his judgment in allowing the LAD did not deal with the assessment of damages to determine the reasonable compensation to be paid for breach of contract. In doing so, he fell into error in relying on cl 15.0 of the subcontract agreement to award LAD of RM2,535,000 (see paras 42–44).

[Bahasa Malaysia summary

Ini merupakan rayuan dari perintah Mahkamah Tinggi yang mengetepikan tuntutan plaintif terhadap responden pertama dan membenarkan tuntutan balas responden pertama terhadap perayu. Perayu menuntut untuk kerja yang telah diselesaikan berjumlah RM571,506.22 dan jumlah tahanan berjumlah RM318,871.16 untuk satu subkontrak dengan faedah 5% setahun. Manakala perayu pertama membuat tuntutan balas untuk kos kerja pembaikan berjumlah RM540,828.52 dan ganti rugi jumlah tertentu yang telah dipastikan ('LAD') berjumlah RM2,535,000 berdasarkan klausa 15.0 subkontrak dengan faedah atas kedua-dua jumlah pada skala 5% setahun. Perayu menegaskan bahawa kerja subkontrak telah diselesaikan pada Januari 2008 dan pada 28 Ogos 2009 perayu telah menghantar tuntutan akhirnya, selepas menghantar empat tuntutan akhir sebelum itu. Tuntutan akhir bertarikh 28 April 2009 adalah berdasarkan satu surat bertarikh 11 Jun 2009 dari responden pertama yang mengandungi pengiraan akhir mengesahkan dan mengakui bahawa bayaran akhir berjumlah RM571,506.22, yang mana dihujahkan oleh perayu merupakan pengesahan dan pengakuan responden pertama bahawa jumlah RM571,506.22 adalah perlu dibayar berserta dengan jumlah tahanan. Responden pertama menafikan bahawa surat bertarikh 11 Jun 2009 tersebut mengakui apa-apa liabiliti tapi hanya mengesahkan jumlah yang masih belum dibayar, namun jumlah tidak yang belum dibayar ini tidak perlu dibayar kepada perayu kerana kerja tersebut tidak disiapkan ataupun dibaiki. Oleh kerana ketidakselesaian tersebut, perayu pertama terpaksa melantik kontraktor pihak ketiga untuk membaiki kerja yang mana kosnya adalah untuk ditolak selesai dengan jumlah bayaran yang perlu dibayar kepada perayu, dan kemudiannya membentuk asas tuntutan balas, yang mana responden pertama menuntut jumlah RM540,828.52 setelah menolak selesai kos dan perbelanjaan yang ditanggung untuk membaiki kerja yang tidak

dilakukan oleh perayu dan ganti rugi jumlah tertentu yang telah dipastikan berjumlah RM2,350,000 dikira berdasarkan klausa 15.0 perjanjian subkontrak tersebut. Perbalahan antara pihak-pihak adalah berpusatkan sama ada setiap pihak berjaya membuktikan kes masing-masing.

Diputuskan, membenarkan sebahagian rayuan, mengetepikan awad RM2,535,00 untuk LAD; dan mengekalkan tuntutan balas:

(1) Beban adalah di atas perayu untuk membuktikan kesnya. Berdasarkan sijil pembayaran No 10, mengesahkan pada 19 Mac 2008, kemajuan kerja terkini adalah pada 93.98% sahaja. Ini bertentangan dengan tuntutannya bahawa kerja telah diselesaikan. Tambahan lagi, perayu mengaku selepas Januari 2009, dia menerima surat dari responden pertama yang mengadu bahawa kerja tidak selesai dan mempunyai kecacatan. Terdapat banyak surat aduan sedemikian rupa sehingga akhir Disember 2008. Perkara ini sekali lagi menyangkal tuntutannya bahawa kerja telah diselesaikannya pada Januari 2008 (lihat perenggan 28–30).

(2) Hakim bicara yang terpelajar membuat dapatan bahawa setakat Januari 2008, perayu belum menyelesaikan kerja subkontraknya. Hakim terpelajar juga mendapati bahawa perayu memilih untuk tidak mengemukakan apa-apa keterangan untuk menunjukan bahawa perayu telah menyelesaikan kerja dan keterangan tersebut adalah tidak mencukupi untuk menyangkal keterangan yang dikemukakan oleh responden pertama. Di akhir perbicaraan, hakim terpelajar mengetepikan tuntutan perayu. Ini adalah berdasarkan dapatan fakta oleh hakim yang terpelajar yang memiliki kelebihan audio dan visual yang melihat dan mendengar saksi sewaktu perbicaraan. Sesuatu Mahkamah rayuan akan perlahan untuk menganggu dapatan fakta oleh hakim terpelajar kecuali mana adalah nyata bahawa hakim tersebut salah. Oleh yang demikian, mahkamah memutuskan bahawa hakim terpelajar tidak terkhilaf dalam mengetepikan tuntutan perayu terhadap responden (lihat perenggan 34 & 36).

(3) Hakim terpelajar memutuskan bahawa perayu tidak mencabar secara serius keterangan yang dikemukakan untuk menyokong tuntutan balas dan bahawa mahkamah sewajarnya menerima keterangan responden pertama dan membenarkan tuntutan balas secara sepenuhnya sepertimana diplid. Mahkamah ini bersetuju dan hakim bicara terpelajar tidak terkhilaf dalam membenarkan tuntutan responden pertama untuk jumlah RM540,828.52. Akan tetapi mahkamah tidak bersetuju dengan keputusan Yang Arif untuk membenarkan tuntutan reponden pertama untuk LAD berjumlah RM2,535,000 (lihat perenggan 39–40).

(4) Mahkamah tertinggi telah menguruskan perkataan 'whether or not actual damage or loss is proved to have been caused thereby' dalam s 75 Akta Kontrak 1950 ('Akta tersebut') yang mana ia memutuskan bahawa

walaupun mengambil kira perkataan tersebut, seorang plaintif yang menuntut untuk kerugian sebenar dalam satu tuntutan pelanggaran kontrak masih perlu membuktikan kerugian sebenar atau pampasan yang wajar. Responden pertama menuntut jumlah RM2,535,000 sebagai LAD berdasarkan s 75 Akta tersebut. Hakim terpelajar dalam penghakiman membenarkan LAD tidak menguruskan penentuan kerugian untuk menentukan pampasan yang wajar untuk dibayar untuk pelanggaran kontrak. Semasa membuat sedemikian, dia telah terkhilaf bergantung kepada klausa 15.0 perjanjian subkontrak untuk memberikan award LAD berjumlah RM2,535,000 (lihat perenggan 42 & 44).]

Notes

For cases on liquidated ascertained damages, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 5024–5025.

For cases on person who alleged fact had to prove it, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 943–957.

Cases referred to

Hadley v Baxandale (1854) 9 Exch 341; [1843–60] All ER Rep 461 (refd)

Hong Yik Trading v Liziz Plantation Sdn Bhd [2017] 5 MLJ 398, FC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609, FC (refd)

Tekun Nasional v Plenitude Drive (M) Sdn Bhd and other appeals [2018] 4 MLJ 567, CA (refd)

Legislation referred to

Contracts Act 1950 s 75

Evidence Act 1950 s 101

Appeal from: Suit No BKI-22NCVC-90/8 of 2015 (High Court, Kota Kinabalu)

Lim Pitt Kong (PK Lim & Co) for the appellant.

Wong Heu Fun (Alvin Leong Yin Yuan with him) (Leong & Wong Advocates) for the first respondent.

S Vanugopal (S Vanugopal & Partners) for the second respondent.

Stephen Chung JCA (delivering judgment of the court):

THE APPEALS

[1] The appellant filed an action against the first and second respondents for: (i) a sum of RM571,506.22 being the final claim for work done under a subcontract with interest thereon at a rate of 5%pa from the 11 June 2009 to the date of full payment; (ii) a sum of RM318,871.16 being the retention sum payable under the subcontract with interest thereon at the rate of 5%pa from the 9 December 2014 to the date of full payment; and (iii) costs.

[2] The first respondent denied the appellant's claims and filed a counterclaim for a sum of RM3,075,828.52 being the costs of rectification of defective works under the subcontract and liquidated ascertained damages ('LAD') with interest of 5%pa on the sum of RM3,075,828.52 from 26 January 2015 till the date of full payment and costs.

[3] The second respondent denied the appellant's claims and averred that there was no joint-venture agreement between the first and second respondent and filed a third party action against the first respondent.

[4] After a trial, the learned trial judge found that the appellant had failed to prove his claims against the first and second respondents and dismissed the appellant's claims with costs. As for the counterclaim, the learned trial judge ruled that the first respondent had proved its case and allowed the counterclaim of RM3,075,828.52 in full with interest and costs.

[5] In respect of the third party proceedings, he found that from the facts it was clear that the second respondent was not a party to the subcontract and there was no necessity to deal with the issue in the third party proceeding brought by the second respondent against the first respondent and for each party to bear their own costs.

[6] The appellant filed an appeal against the whole decision of the learned trial judge whereas the second respondent filed a cross-appeal.

[7] After hearing submissions, the appellant applied to withdraw the appeal against the second respondent, with no objection, and the second respondent accordingly applied to withdraw the cross-appeal. The appeal against the second respondent was struck out and the cross-appeal was struck out. Therefore it was not necessary for us to deal with the appeal against the second respondent and the cross-appeal of the second respondent in our grounds.

A THE BACKGROUND FACTS

[8] The appellant traded in the name and style of Goldwell Trading. The first respondent was established by China Railway Group Ltd ('CRGL') in 2001 to undertake railway construction projects in Malaysia.

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[9] The first and second respondent entered into a joint-venture agreement as the contractor to undertake a project known as 'Cadangan Pemulihan dan Pembangunan lnfrastruktur Keretapi Negeri Sabah' awarded by the Ministry of Transport, Malaysia to Suria Capital Holdings Bhd ('SCHB') as the main contractor.

C

[10] By a letter dated 9 March 2007 with a bill of quantities, the appellant applied to be a subcontractor. By a letter of award, dated 12 March 2007, the appellant was appointed as a subcontractor to construct earthworks, soil improvement, drainage and pipe culverts from Kinarut–Papar (KM20–KM39) for the project for a sum of RM5,034,302.80 commencing 18 March 2007 and to be completed by 31 August 2007 with defect liability period of 24 months. Clauses 7.0 and 8.0 of the subcontract agreement dated 6 April 2007 provides for variations and under cl 9.0 the retention sum shall be equivalent to 10% of the interim progress payment but subject to a maximum of 5% of the subcontract sum. There were 17 variation orders. With the variations included, the subcontract sum amounted to RM6,377,423.15.

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[11] Prior to the subcontract, the second respondent withdrew from the joint-venture. The appellant said that he was unaware of the second respondent's withdrawal from the project and it was the duty of the first respondent to inform him whereas the first respondent argued that the appellant knew as early as May 2007 of the second respondent's withdrawal.

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[12] The appellant contended that he had completed the works and had been paid RM5,487,045.77 but the first respondent refused to pay the balance contract sum of RM890,377.38 which comprised of RM571,506.22 and the retention sum of RM318,871.16. The appellant argued that he was entitled to the sums.

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[13] The first respondent however contended that the appellant failed to complete the works and there were defective works to be rectified which required the first respondent to incur costs and expenses to remedy the works resulting in delays to the project. The first respondent claimed for the costs and expenses and for the LAD.

I

THE APPELLANT'S SUBMISSION

[14] The appellant submitted that it had completed the subcontract works in January 2008 and on 28 April 2009 it had submitted the final claim for RM1,174,408.91. The appellant relied on a letter dated 11 June 2009 issued by the joint-venture to the appellant a final calculation certifying the final payment of RM571,506.22 as due and payable.

[15] The appellant submitted that as at 11 June 2009 there were no complaints from respondents or that the appellant had failed to complete the subcontract works or had failed to rectify any alleged defective works.

[16] The appellant submitted that the settlement or finalisation of accounts between the parties had taken into account any and all defective works that might be attributed to the appellant after the engineers' review and the certificate of practical completion ('CPC') issued by the Government of Malaysia to the main contractor SCHB and that the final accounts superseded any defective and non-completion works based on the complaints of the respondents.

[17] The appellant submitted that the learned trial judge had misdirected himself that the appellant did not take any steps to produce credible evidence to show otherwise that defective works were completed and had failed to established his case.

[18] The appellant submitted that the learned trial judge in his grounds of judgment had not alluded to nor found any complaints of defective and non-completion works still unperformed by the appellant after 11 June 2009 and therefore failed to consider that the appellant had rectified all the works. It was submitted that he ought to have found that the appellant had proven his claims on a balance of probability by the settlement/finalisation of accounts between them as at 11 June 2009 and entitled to judgment.

[19] The learned trial judge erred in fact and in law in allowing the counterclaim against the appellant for the sum of RM3,075,825.52 because cl 15 of the contract required the respondents to prove the actual loss and damage before any compensation could be awarded to warrant any recovery of LAD.

THE SUBMISSION OF THE FIRST RESPONDENT

[20] It is trite that the burden of proof to establish the case at all times lies on the appellant. The first respondent submitted that the appellant merely relied on the first respondent's letter dated 11 June 2009 to assert that he had

completed the subcontract works and that there was an admission of liability on the part of the first respondent to pay the sum of RM890,377.38 to him. However DW3 had been consistent and maintained his position that the letter dated 11 June 2009 did not contain any admission of liability and the purpose of writing the said letter was to correct the wrong calculations by the appellant. According to DW3 the sum of RM890,377.38 was the balance of the contract amount and not the value for work done which would be released to the appellant had he completed all the subcontract works but the plaintiff had failed to do so.

[21] It was submitted that the appellant had taken different positions on his claims and ought to have called his alleged accountant to come to court to prove his claim but the appellant did not bother to adduce any documentary evidence to support his claims. In the absence of any documentary evidence, the appellant failed to discharge the burden.

[22] It was submitted that despite the appellant's contention that he had purportedly completed his work in January 2008, he admitted during cross-examination that there were variation orders issued after January 2008 which the first respondent argued that the plaintiff had failed to complete and failed to rectify the defective work as per the subcontract.

[23] The first respondent contended that there was no certificate of completion issued by the first respondent to the appellant and as such, the defects liability period had not commenced. It was submitted that as the appellant had failed to complete his work under the subcontract, there was no handing over of the subcontract works or delivery of full vacant possession by the appellant to the first defendant.

[24] The first respondent submitted that its counterclaim arose out of the appellant's non-completion of the work as well as his failure to rectify the defective work and as a result, the first respondent had suffered loss and damage. It was submitted that the witnesses (DW1, DW2 and DW4) were called to confirm the authenticity and contents of the documents supporting the first respondent's counterclaim and that it had adduced evidence, both oral and documentary, to prove its counterclaim against the appellant.

[25] The first respondent referred to cl 15 of the subcontract agreement which provides for LAD at RM5,000 per day. The first respondent submitted that the completion date was 31 August 2007 and there was a delay of 507 days from 1 September 2007–20 January 2009 which amounted to RM2,535,000 in total (507 days x RM5,000). The first respondent contended that it had established the loss and damage it had suffered due to the plaintiff's delay and non-completion of work.

THE DECISION OF THE COURT

[26] Based on the record of appeal and the submissions, both written and oral, the contentions of the parties very much centered on whether each party had proved their respective case against the other.

[27] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on whom the burden of proof lies fails to discharge it, the other party need not call any evidence: *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398.

[28] The crux of the appellant's case against the respondents pleaded in paras 8–11 of his statement of claim was that he had completed the subcontract works in January 2008 and on 28 April 2009 he submitted the final claim under the subcontract in the sum of RM1,174,408.91. The appellant contended that by a letter, dated 11 June 2009, the respondents issued final calculation certifying and admitting that final payment in the sum of RM571,506.22 was due to him and also certified and admitting that one-half of the retention sum of RM318,871.16 would be released to him upon the issuance of the certificate of practical completion and the other half upon expiry of the defects liability period within two years. The burden was on the appellant to prove his case.

[29] On evidence, the appellant argued that he had completed the subcontract works in January 2008 and relied on his final claim dated 28 April 2009 for the sum of RM1,174,408.91. He did not attach a general summary of claim or any supporting document that as at January 2008 the works had been completed. In his progress claim No 10 dated 22 January 2008 for RM1,087,303.74 due, it was supported by a general summary of claim showing current progress of 100%. However, based on the payment certificate No 10, certified on 19 March 2008, the current progress was 93.98% only. The appellant did not complain that the certification was wrong. This contradicted his claim that the works had been completed.

[30] The appellant explained that based on his calculation it should be 97.85% and the works were therefore practically completed. He was asked and he admitted that after January 2008 he had received letters from the first respondent complaining of defective and non-completion works. In a letter dated 29 May 2008 the appellant was required to rectify the existing issues on formation level, formation width and slope. In another letter dated 18 June 2008, it stated that during inspection of survey engineer that the width formation at KM27.080–KM27.260 and KM27.405–KM 27.650 did not

achieve to the requirement of design level and required the appellant to rectify and complete as soon as possible to avoid possible delay for next work. There were many such letters of complaint up to end of December 2008 for the appellant to improve and complete all remaining works. These again contradicted his claim that he completed the works in January 2008.

[31] Prior to his final claim of 28 April 2009, the appellant had submitted his final claim, dated 31 October 2008, 26 November 2008 and 30 December 2008 respectively, for RM1,679,126.58 which was for a different sum. He then submitted another final claim dated 28 August 2009 for RM571,506.22 plus the retention sum of RM318,377.38. The first respondent complained that the appellant had taken varying positions on his claim. There was no explanation for the different sums claimed.

[32] His final claim, dated 28 August 2009, was based on the final calculation list attached to the letter dated 11 June 2009 which he received from the first respondent. The appellant argued that by this letter the first respondent had certified and admitted that final payment in the sum of RM571,506.22 was due and payable plus the retention sum.

[33] DW3 testified that the first respondent never admitted liability in the letter. Looking at the final calculation list, it showed the confirmed value of work at RM6,377,423.15 and RM5,487,045.77 as paid before leaving RM890,377.38 as amount unpaid. He explained this did not mean that this amount would be paid to the appellant because the appellant did not complete and did not rectify the works complained of causing delay to the project. He testified that the first respondent had appointed third party contractors to rectify the works in the sum of RM313,339.16, RM287,266.74, RM710,600 and RM120,000 to be set off against the sum of RM890,377.38 and the claim for LAD of RM2,535,000 (see letter dated 4 July 2011 from solicitors of the first respondent to solicitors of appellant).

[34] The learned trial judge found that by January 2008 the plaintiff had yet to complete its subcontract works. He ruled that although the appellant insisted that all the defects raised by the first respondent had been completed and that there was an admission, the appellant opted not to call any evidence to show that he had completed the works and the learned trial judge found that the evidence was insufficient to contradict the evidence adduced by the first respondent.

[35] Based on the appeal record, since 11 June 2009, there was no letter and the appellant did not produce any letter addressed to the first respondent stating that the first respondent had admitted that the said sums were due and payable and therefore suing on the admission or alleged settlement. Since then

the appellant did not take any step to demand payment of the sums although he alleged that the first respondent had admitted that the sums were due and payable until he filed the suit in 2014. Based on the contemporaneous documents in the record of appeal, there was no such admission in the first respondent's letter dated 11 June 2009 and there was no admission by the first respondent that the sum of RM571,506.22 and the retention sum of RM318,871.16 were due and payable to the appellant. The evidence led by the appellant failed to establish the admission or the existence of an alleged enforceable settlement between the parties: see *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609.

[36] At the end of the trial the learned trial judge dismissed the claims of the appellant against the respondents. These were based on findings of facts by the learned trial judge who had the audio and visual advantage of watching and listening the witnesses during the trial. An appellate court would be slow to disturb the findings of facts of the learned trial judge unless he was plainly wrong. Therefore we were unanimous in our decision that the learned trial judge had not erred in dismissing the appellant's claims against the respondents.

[37] In respect of the counterclaim, the first respondent claimed the sum of RM3,075,828.52 which comprised of RM540,828.52 after setting off for costs and expenses incurred to rectify the works not done by the appellant and LAD of RM2.535,000.

[38] The witnesses for the first respondent had testified on the incomplete works and the works carried out by third party subcontractors to remedy the defective works of the appellant and these witnesses had produced documents in support of the claims during the trial. We have referred to these figures above. At the end of the trial, the learned trial judge allowed the first respondent's counterclaim against the appellant. The appellant submitted that the learned trial judge had misdirected himself on the evidence and had erred in allowing the counterclaim.

[39] In his judgment, the learned trial judge ruled that the appellant did not put up a serious challenge on the evidence that was adduced to support the counterclaim and that the court ought to accept the evidence of the first respondent and allowed the counterclaim in full as pleaded. We have scrutinised the appeal record. We agreed that the learned trial judge did not err in allowing the first respondent's claim for the sum of RM540,828.52.

[40] However, we were unable to agree with his decision in allowing the first respondent's claim for LAD of RM2,535,000. The LAD was calculated at RM5,000 per day times 507 days. In allowing the LAD, the learned trial judge

relied on cl 15.0 of the subcontract agreement which states that 'The Liquidated Ascertained Damages for the subcontract shall be RM5,000.00 (Ringgit Malaysia: Five Thousand Only) per day inclusive of any public holidays without having the Contractors to show any proof of damages'.

[41] Under s 75 of the Contracts Act 1950, when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[42] The apex court had dealt with the words 'whether or not actual damage or loss is proved to have been caused thereby' in s 75 of the Act where it was held that despite the words in question, a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley v Baxandale* (1854) 9 Exch 341; [1843–60] All ER Rep 461. Any failure to prove such damages will result in the refusal of the court to award such damages. In every case the court must determine what is the reasonable compensation: *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817.

[43] The first respondent submitted that the completion date for the subcontract was 31 August 2007 and there was a delay of 507 days from 1 September 2007–20 January 2009. Because of the appellant's delay, the performance bond and insurance had to be extended and the total costs of this extension was RM360,996.38. It was submitted that due to the defective works and delay, the first respondent had to charter shuttle buses to ferry passengers between the affected routes and had to pay RM2,137,642 to two bus companies. These two sums amounted to RM2,498,638.38. It was submitted that the LAD of RM2,535,000 was justifiable as it had suffered loss and damage well in excess of this sum. The first respondent did not claim the aggregated sum of RM2,137,638.38 as costs and expenses incurred. It did not claim this sum as reasonable compensation for the LAD. Instead it claimed the sum of RM2,535,000 as LAD based on cl 15.0 of the subcontract agreement.

[44] The first respondent failed to prove the LAD under s 75 of the Act. The learned trial judge in his judgment in allowing the LAD did not deal with the assessment of damages to determine the reasonable compensation to be paid for breach of contract. In doing so he fell into error in relying on cl 15.0 of the subcontract agreement to award the LAD of RM2,535,000: see *Tekun Nasional v Plenitude Drive (M) Sdn Bhd and other appeals* [2018] 4 MLJ 567. For the

reasons given, the appeal was allowed in part and the award of RM2,535,000 for LAD was set aside. The counterclaim for the sum of RM540,828.52 was affirmed. No order as to costs. Costs of RM5,000 to the second respondent.

Appeal allowed in part, award of RM2,535,000 for LAD set aside; counterclaim affirmed.

Reported by Izzat Fauzan